INTERIOR BOARD OF INDIAN APPEALS

Paul Chissoe v. Acting Muskogee Area Director, Bureau of Indian Affairs

25 IBIA 146 (01/25/1994)

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VA 22203

PAUL CHISSOE
v.
ACTING MUSKOGEE AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 93-93-A Decided January 25, 1994

Appeal from a decision declining to cancel a lease of Indian land.

Affirmed.

1. Indians: Leases and Permits: Cancellation or Revocation

A Bureau of Indian Affairs Superintendent must follow the procedures in 25 CFR 162.14 when cancelling a lease of Indian land issued under 25 CFR Part 162.

APPEARANCES: Appellant, pro se.

OPINION BY ADMINISTRATIVE JUDGE VOGT

Appellant Paul Chissoe, heir of Pauline Chisholm, Creek Allottee 9474, seeks review of a February 25, 1993, decision of the Acting Area Director, Bureau of Indian Affairs (Area Director; BIA), declining to cancel Business Lease G07-2088, covering appellant's 1-acre tract in Tulsa County, Oklahoma. 1/ For the reasons discussed below, the Board affirms the Area Director's decision.

Background

Appellant leased his tract to the Indian Nation Investment and Development Corporation (lessee) for the purpose of conducting a smokeshop business. The lease was approved by the Superintendent, Okmulgee Agency, BIA, on August 24, 1990, and has a 5-year term beginning September 1, 1990, with an option in lessee to extend the lease for another 5 years.

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1/ As described in the lease, the tract is:

"A one-acre tract of land with a frontage on South Yale of 208.7 feet, and a depth of 208.7 feet in the Northeast Corner of the South Half (S/2) of the Southeast Quarter (SE/4) of the Southeast Quarter (SE/4) less the West 778 feet thereof of Section 28, Township 18 North, Range 13 East, Tulsa County, State of Oklahoma."

The lease states that the property is "to be used only for the following purposes: SMOKESHOP." Paragraph 25 provides:

> The activities of the Lessee will be limited to those set out herein. The sale of alcoholic beverages, including beer of any percentage of total weight, is specifically not covered and will not be permitted without the prior written consent of all parties to this lease. No mobile home or trailer home shall be moved on the business site for living purposes.

Paragraph 14(E) provides: "Lessee shall install fencing and gates, which will be removed by the Lessee upon expiration of this lease."

Evidently, lessee initially sold only tobacco products. However, by early 1992, it had begun to sell a number of unrelated items. 2/ On January 8, 1992, appellant wrote to the Realty Officer of the Muscogee (Creek) Nation (Realty Officer), 3/ stating that he believed lessee was in violation of the lease. He proposed that lessee be offered the following options:

> A. Discontinue the sale of non-tobacco, products and sell tobacco products only.
>
> B. If Lessee wishes to continue selling non-tobacco products; an itemized list specifying such related items to be sold shall be presented to the Lessor within 30 days. It shall then be determined what reasonable amount of compensation shall be paid to the Lessor through a monthly rental increase.
>
> C. If Lessee does not wish to comply with option A or B, the Lease Agreement will be terminated, at which time Lessee has 60 days to vacate property.

Appellant's letter also stated that lessee had not constructed a fence, as required by paragraph 14(E) of the lease, and that a trailer had been parked on the property from mid-November 1991 through January 6, 1992, in violation of paragraph 25. 4/

2/ A Feb. 21, 1992, article from the Tulsa World, included in the record, indicates that, upon rebuilding after an Oct. 1991 fire, lessee expanded its inventory to include, among other things, clothing, jewelry, and original Indian art.

3/ Evidently, the Nation performs the realty functions of the Okmulgee Agency under a P.L. 93-638 contract.

4/ Appellant continued: "I believe the violation [apparently of paragraph 25] also includes other equipment on the property, such as the tractor and farm implements or storage of other personal property. This poses an extremely degrading appearance to the property."

A tribal employee inspected the property on February 16, 1992, and found that lessee was selling "cokes, Indian art, tee-shirts, etc." He found that no fence bad been constructed. He did not observe a trailer parked on the property.

On February 24, 1992, the Realty Officer wrote to lessee, stating: "It appears that you are selling products that are not covered in your lease contract, i.e., food, beverages, etc. Any sales beyond the scope of the lease agreement would require the approval of the Lessor and the Bureau of Indian Affairs." The Realty Officer also informed lessee that it must construct a fence as soon as possible. His letter concluded:

> Since these stipulations are a part of your consideration for said lease, it is imperative that corrective action be taken immediately. Pursuant to Title 25 Code of Federal Regulations, Section (162.14), you have ten days from the date of receipt of this notice in which to show cause why the lease should not be cancelled. In the event additional time is needed in order to take the necessary corrective measures, you should notify this office within ten (10) days from receipt of this notice.

Lessee responded in early March, requesting additional time for resolving the issues and asking to discuss the matter. 5/ It is not clear whether any discussions took place. On March 25, 1992, appellant renewed his request for action. On June 9, 1992, the Realty Officer wrote to lessee, stating:

> Further reference is made to our letter dated February 24, 1992, pertaining to sales beyond the scope of the * * * lease agreement. Be advised that [appellant] would like for you to either abide by the lease agreement by discontinuing the sales of any other products or renegotiate the lease.
>
> Please inform this office of your intentions as soon as possible.

By letter of July 13, 1992, lessee stated that it wished to renegotiate the lease. The Superintendent, who evidently was not furnished with a copy of lessee's July 13 letter, wrote to lessee on August 7, 1992, cancelling the leases. 6/ After learning of the July 13 letter, the Superintendent

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5/ Lessee's undated letter, received by the Realty Officer on Mar. 4, 1992, indicated that it had previously contacted both appellant and the Realty Officer.

6/ The Superintendent's letter stated:

"In our letter of June 9, 1992, [presumably, the Realty Officer's letter] you were advised of your violation of the terms of the lease contract by your failure to discontinue the sale of any other products or try to renegotiate the lease. In absence of any response, be advised that Lease No. G07-2088 is cancelled effective immediately."

rescinded his August 7 cancellation. Attempts at negotiation were then initiated. Appellant requested that lessee furnish a list of items it wished to sell. By letter of September 2, 1992, lessee furnished such a list.

On September 21, 1992, appellant wrote to the Realty officer, stating: "I am unwilling to modify the lease agreement since [lessee] has breached the terms of the original agreement and did not act in good faith. Therefore, in order to allow [lessee] ample time to remove [its] operation, I would like the lease to terminate effective December 31, 1992."

On October 22, 1992, the Superintendent wrote to lessee, stating:

> [Appellant] has informed this office that he would like to terminate the lease agreement but is willing to allow you ample time to remove your operation from the premises.
>
> Accordingly, we are enclosing the appropriate cancellation forms to be executed and returned to this office. Please note the effective cancellation date is December 31, 1992. We will obtain the other signatures and return a copy of the Cancellation form for your records.

Enclosed with the letter was a partially completed cancellation form which stated that the cancellation was by mutual agreement between appellant and lessee. Lessee did not sign the cancellation form. Instead, it responded by proposing a lease amendment which would, inter alia, extend the term of the lease to 35 years, allow the sale of a wide variety of items, and increase the rent. On November 23, 1992, appellant rejected the proposed amendment and again stated that he wished to have the lease terminated on December 31, 1992.

On November 24, 1992, the Superintendent wrote to lessee, stating:

> Apparently, you are not in agreement to the mutual cancellation of the lease agreement as proposed in our letter of October 22, 1992. It appears you are still in violation of the lease by selling products that are not covered in the lease contract which was set forth in our letter of February 24, 1992, requesting that you show cause as to why the lease should not be cancelled. Therefore, we are left with no alternative but to cancel the lease agreement effective December 31, 1992. This should allow you ample time to remove your operation from the premises.

On December 11, 1992, lessee's attorney wrote to the Superintendent, requesting that the Superintendent rescind the cancellation because lessee had been attempting in good faith to negotiate changes in the lease. He stated that his client had "removed and [was] not selling any products on the property other than items customarily sold in smoke shops" (Dec. 1,

1992, Letter at 1) and asserted that his client had "cured all breaches, if any existed." Id. at 2. The letter also indicated that lessee did not believe sale of non-tobacco items violated the lease.

The Superintendent did not rescind the cancellation, and the lessee appealed to the Area Director. In the decision on appeal here, issued on February 25, 1993, the Area Director vacated the Superintendent's decision, stating:

> Departmental regulations in 25 CFR 162 ensure that due process is accorded to all parties to a lease on Indian land before such a lease may be cancelled. While I make no finding on the validity of your arguments or whether lease violations existed, it is my determination that the record is not clear that [lessee] was adequately and timely informed that negotiations toward an amendment of the lease had ceased. Since the original show cause notice in February, 1992, the later cancellation notice issued by the Superintendent was rescinded and negotiations ensued. As late as November 20, 1992, before the November 24, 1992, notice of cancellation, [lessee's attorney] was corresponding with the Superintendent concerning [lessee's] desire to enter into an amendment to the lease.
>
> I am, therefore, pursuant to delegated authority, vacating the Superintendent's decision of November 22 [sic, should be 24], 1992, and this matter is being remanded to him for further consideration.

(Area Director's Feb. 25, 1993, Decision at 3). By letter of April 12, 1993, the Area Director informed appellant of the decision.

Appellant's notice of appeal was received by the Board on May 17, 1993. In addition to his notice of appeal, appellant filed a statement of reasons. No other briefs or statements were filed.

Discussion and Conclusions

Appellant contends that lessee has misled him as to its intentions concerning the leased property. He repeats the allegations of lease violations that he made earlier to the Realty Officer. Further, he contends that lessee is currently in breach of the lease because it is operating without a tobacco license.

Appellant does not contend that any of the alleged lease violations, except for lessee's alleged lack of a tobacco license, are ongoing. He does not dispute lessee's December 1, 1992, statement that it had discontinued sale of non-tobacco products. He acknowledges in his statement of reasons

that a fence has now been constructed. Finally, he does not contend that the trailer is still parked on the property. 7/

[1] 25 CFR 162.14 provides:

> Upon a showing satisfactory to the Secretary that there has been a violation of the lease or the regulations in this part, the lessee shall be served with written notice setting forth in detail the nature of the alleged violations and allowing him ten days from the date of receipt of notice in which to show cause why the lease should not be cancelled. * * * If within the ten-day period, it is determined that the breach may be corrected and the lessee agrees to take the necessary corrective measures, he will be given an opportunity to carry out such measures and shall be given a reasonable time within which to take corrective action to cure the breach.

The only show-cause notice sent to lessee in this matter was the February 24, 1992, letter from the Realty Officer. Negotiations for modification of the lease were initiated subsequent to that letter and were ongoing at least until September 21, 1992, when appellant wrote to the Realty Officer, indicating that he was no longer interested in a lease modification. Instead of reinstating the February show-cause letter, however, the Superintendent wrote to lessee, recommending cancellation of the lease by mutual agreement. There is no way lessee could have gleaned from this act that the Superintendent intended to cancel the lease for cause unless lessee cured its breach(es). In fact, the Superintendent's proposal of a voluntary cancellation suggested that he had abandoned his earlier effort to cancel the lease for cause. The Superintendent's October 22, 1992, letter clearly failed to comply with the notice requirement of 25 CFR 162.14. The Board therefore agrees with the Area Director's conclusion that lessee was not given adequate notice of cancellation.

25 CFR 162.14 not only requires notice, but also requires that a lessee be given an opportunity to take corrective action. The Board has previously stated that "[s]ection 162.14 contemplates that leases of Indian lands will not be cancelled for breaches that may readily be cured." Plumage v. Billings Area Director, 19 IBIA 134, 142 (1991). Lessee notified the Superintendent on December 1, 1992, 6 days after the date of the cancellation letter, that it had ceased selling the items to which appellant objected. 8/ It clearly appears that, had lessee received the notice required by 25 CFR 162.14, it could easily have taken corrective action and

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7/ It appears from the record that the trailer observed by appellant was removed prior to Feb. 16, 1992, the date on which a tribal employee inspected the property.

8/ Apparently, lessee also cured the other breach mentioned in the Feb. 24, 1992, show-cause letter, i.e., lack of a fence. As noted above, appellant's statement of reasons indicates that the fence has been constructed.

thus avoided cancellation. Lessee was entitled to an opportunity to take such action.

Appellant also contends that lessee is now in violation of the lease because it does not have a tobacco license. Paragraph 24 of the lease provides: "It is hereby understood and agreed that this agreement may be terminated upon any of the following conditions: * * * D. The loss or cancellation of the Muscogee (Creek) Nation Tobacco License." As far as the record here shows, BIA has never given lessee notice under 25 CFR 162.14 that its lease is subject to cancellation for this reason. As discussed above, such notice is a prerequisite to lease cancellation under this section.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the Area Director's February 25, 1992, decision is affirmed.

//original signed
Anita Vogt
Administrative Judge

I concur:

//original signed
Kathryn A. Lynn
Chief Administrative Judge